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No. 83-265

In the Supreme Court of the United States

OCTOBER TERM, 1983

DENISE A. CHAFFEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that this Court should modify the rule of *Feres* v. *United States*, 340 U.S. 135 (1950), so as to permit her to maintain an action under the Federal Tort Claims Act to recover damages for injuries she suffered while an Army recruit allegedly due to malpractice by military physicians.

1. Petitioner was completing basic training in the United States Army when, on July 25, 1979, she was admitted to the Noble Military Hospital at Fort McClellan, Alabama, complaining of abdominal pains and amenorrhea. Two weeks later, during a surgical procedure, she suffered serious permanent injuries allegedly due to the negligence of military medical personnel. Petitioner has subsequently received prolonged rehabilitative treatment in various veterans' hospitals and is eligible for the full range of veterans' benefits (Pet. 2-3, 25).

As required by the Federal Tort Claims Act, 28 U.S.C. 2675(a), an administrative claim for damages was filed with the United States Army on July 24, 1981. The Army rejected the claim on August 13, 1981, citing the rule of *Feres* v. *United States, supra* (see Pet. 4, 20). Petitioner then filed this action under the FTCA in the United States District Court for the District of Massachusetts. The district court dismissed the complaint for failure to state a claim upon which relief could be granted. The court of appeals affirmed, stating (Pet. App. 1a-2a):

> No reason has been pointed out sufficient for us to distinguish this case on a principled basis from the many cases which courts have held were barred under *Feres*. Congress as well as the Supreme Court has had over thirty years since the decision in *Feres* to take corrective action should either body have believed that *Feres* cut too wide a swathe.

2. As the court of appeals recognized (Pet. App. 1a), the decision in this case is controlled by *Feres* v. *United States, supra*. In *Feres* the Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. There can be no doubt that petitioner's injuries are "incident to service" within the meaning of *Feres*, for two of the cases decided together with *Feres* presented claims for damages for alleged malpractice by Army surgeons. See 340 U.S. at 135 n*, 136-137. The *Feres* doctrine itself was reaffirmed in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977). And the vitality of the considerations that underlie *Feres* was most recently reaffirmed in

Chappell v. *Wallace*, No. 82-167 (June 13, 1983). Accordingly, petitioner's complaint was properly dismissed on the basis of *Feres*.[1]

3. Petitioner presents a catalogue of reasons why the application of *Feres* to malpractice by military physicians should now be reconsidered. See, *e.g.*, Pet. 36-38. But it is not seriously suggested that the decision below conflicts with any decision of this Court or any other court of appeals. The arguments raised rest on policy considerations, and they accordingly should be addressed to the legislative branch rather than to the courts. Cf. *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), slip op. 21-23. In *Feres* itself the Court took care to note (340 U.S. at 138): "if we misinterpret the Act, * * * Congress possesses a ready remedy." And it is proper to look to Congress for any modification of the prevailing interpretation of the FTCA, not only because the pertinent considerations are policy matters best evaluated by a legislature, but because the Federal Tort Claims Act is a waiver of the sovereign immunity of the United States, which is to be strictly construed, *United States* v. *Sherwood*, 312 U.S. 584, 590-591 (1941), and which can be enlarged only by Congress. *United States* v. *Shaw*, 309 U.S. 495, 500-502 (1940); *Munro* v. *United States*, 303 U.S. 36, 40-41 (1938).

Although the policy arguments advanced by petitioner have been placed before Congress, Congress has not to date taken the action that petitioner seeks. See H.R. Rep. No. 97-384 (Pt. I), 97th Cong., 1st Sess. 5 (1981) (indicating

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[1]Petitioner suggests (Pet. 23-25) that her status as a recruit at the time of her injury warrants creation of an exception to the *Feres* doctrine. But she provides no rational justification for the proposed distinction between soldiers in basic training and other soldiers.

approval of *Feres*).[2] The matter remains before Congress.[3] In the circumstances, the proposed overruling of *Feres* would be especially inappropriate. See generally *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977); *Hodel* v. *Indiana*, 452 U.S. 314, 333 (1981).

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[2]See also *The Feres Doctrine As It Relates to Private Claims: Hearing Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982). During this hearing, government witnesses emphasized the existing array of disability compensation, dependents' benefits, rehabilitation services and medical care afforded to persons disabled while in service in the armed forces. See *id.* at 50 (testimony of Deputy Assistant Attorney General Bonds); *id.* at 61-67 (statement of John H. Thompson, Deputy Assistant General Counsel, Veterans' Administration). The availability of this alternative compensatory scheme was, of course, one of the considerations underlying the decision in *Feres* itself. See 340 U.S. at 140, 144-145 & n.12. The difficulty of integrating a FTCA remedy with the statutory veterans' disability compensation scheme, in the absence of guidance on this subject from Congress, which counseled against judicial recognition of a remedy under the FTCA in *Feres* (see 340 U.S. at 144), remains a compelling consideration against adopting that course today.

[3]See H.R. 1942, 98th Cong., 1st Sess., introduced on March 7, 1983. The bill would add a new Section 2681 to Title 28 of the United States Code providing that, "with respect to claims arising on or after the date of the enactment of this Act,"

> Claims may be brought under [the FTCA] for damages against the United States for the personal injury or death of a member of the Armed Forces serving on active duty if the claim arises out of medical or dental care furnished the member in a Department of Defense hospital.

This bill was the subject of a hearing before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee on April 13, 1983. The bill has not, as yet, been acted upon by the Committee.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1983

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